Supreme Court, U.S.
FILED
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No. 97-1340

In The
Supreme Court of the United States

October Term 1997

UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO, CLC,

Petitioner,

v.

PERFORMANCE FRICTION CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether an appellate court may modify a remedy imposed by the National Labor Relations Board when:

   a. the court determines that the Board exceeded its remedial authority by requiring that an employer completely rescind a facially neutral disciplinary system and reinstate with back pay hundreds of workers discharged over a several year period pursuant to that disciplinary system; and

   b. there is no evidence of union interest, activity or affiliation of such workers.

2. Whether an appellate court may comment in its opinion on facts regarding the total number of employees affected by a disciplinary policy and direct that the National Labor Relations Board, in proceedings following remand, apply well settled law limiting the back pay award for the six employees that the Board found to be discharged in violation of the National Labor Relations Act to the period prior to the time those employees declined to accept an offer of reinstatement.

PARTIES TO THE PROCEEDINGS BELOW AND DISCLOSURE UNDER SUP. CT. R. 29.6

The petition accurately lists the parties to the proceedings below. The Respondent, Performance Friction Corporation, has no parent companies or non-wholly owned subsidiaries.

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STATEMENT OF THE CASE

1. Background

Performance Friction Corporation ("PFC") manufactures high-performance, non-asbestos automotive disc brake pads for a variety of vehicles, for all types of automobile racing, for fleet vehicles, for school buses and for sale in the replacement parts market. App. 2a. Since 1986, when it had 25 employees, it has grown steadily. Id. Its customers have strict quality standards and delivery schedules that PFC must meet weekly. J.A. 329-31. To produce products of exceptional quality, PFC emphasizes training, particularly for its comprehensively computerized operations, and individual responsibility. Any employee has the authority and responsibility to shut down the production process if it is producing parts that fail to meet specification or are of questionable quality. J.A. 739-40. In fact, PFC has been nationally recognized in the industry for empowering its employees and actively involving them in its state of the art computerized production process. J.A. 1217-1221.

Between 1990 and 1994, PFC grew from 100 to 400 employees (a 300 percent increase). See App. 2a. Throughout this same period, although PFC maintained a core group of very loyal and committed employees, a significant percentage of its workers had difficulty meeting or were unwilling to meet PFC's stringent quality standards, work routines and intellectual involvement. PFC thus experienced a large turnover in its workforce annually. Id. During this period of rapid change, PFC also found it necessary to make various changes in its day-to-day policies and procedures.

Beginning in late summer 1993 (well before any union activity at the company), PFC began considering changes to both its pay policies and its disciplinary policies. See App. 3a. Prior to November 1993, PFC's disciplinary policy provided that three minor violations within a thirty-day period equaled a major violation. See App. 4a. An employee who committed two major violations in thirty days received a three-day suspension, and the third major violation in thirty days resulted in termination of employment. App. 4a. PFC found that this policy did not provide effective deterrence to employee misconduct, neglect or sloppiness.

At the same time, PFC was looking for a way to reward conscientious employees and encourage improved performance. Thus, beginning in November 1993, PFC changed both the way it compensated its hourly employees and its disciplinary system. A central component of PFC's new compensation plan was a system of seven pre-defined pay levels. App. 3a. Employees could advance pay levels by taking and passing certain job-related tests at their own pace. J.A. 333-34, 491-92. The new compensation system allowed employees to increase their earnings more rapidly than under the old system, even if they had been disciplined.

PFC also changed its existing disciplinary system. Employees who committed too many violations would not be "rewarded" with time off from work, but would instead have the consequence of a reduced level of pay. See App. 4a. Under the new disciplinary system, any employee who committed two major violations within a ninety-day period or three major violations in six months was demoted a pay level. For employees already at pay level one, the result was termination. App. 4a.

The combination of the pay level system, which allowed increased earnings opportunities, and the revised disciplinary system, which tied the consequences of misconduct or poor performance directly to compensation, provided PFC's employees with an incentive system for

improving production quality and efficiency. For example, employees could be rewarded for reducing the amount of wasted materials and labor from the production of scrap. J.A. 346-347, 351. These policy changes did in fact have this desired result. The undisputed record evidence reveals that PFC's scrap rate dropped from almost 11 percent in late 1993 to 2.7 percent in the months following the implementation of the revised pay and disciplinary policies. App. 3a.

Between February and May of 1994, the United Automobile, Aerospace, Agricultural Implement Workers of America ("Union") engaged in efforts to unionize PFC's workforce. App. 3a. PFC opposed the union efforts. App. 3a.

2. Administrative proceedings below

The hearing before the Administrative Law Judge ("ALJ") was based on a complaint that eleven named employees of PFC had been discharged because of their union activities pursuant to the new disciplinary policy. App. 4a-5a. The original unfair labor practice charge identified two discharged union activists. The first amended charge and the complaint increased the list to six, and the second amended complaint named five additional discharged activists. App. 5a. Despite these various amendments, the complaint did not refer to, nor did it purport to seek relief on behalf of, other similarly situated unnamed employees discharged pursuant to the new disciplinary policy.

At the ALJ hearing in December of 1994, the Board and the Union presented evidence as to only six of the eleven named claimants, each of whom was discharged between April 19 and May 30, 1994. App. 5a. Between April 19, 1994 and the time the case was heard by the ALJ in December 1994, PFC had discharged a total of approximately 180 employees. App. 5a. PFC presented this

evidence at trial in an effort to demonstrate the neutral application of its disciplinary policy.

At the close of the Board's case-in-chief, the Board, the Union, PFC and the ALJ each viewed this case in the same manner -- the government and the Union were seeking relief for eleven named individuals allegedly discharged in violation of Section 8(a)(3) of the National Labor Relations Act ("Act"). Evidence was before the ALJ as to only six individuals. At no time prior to that point had the Board so much as hinted that it was interested in seeking relief on behalf of anyone other than the eleven individuals named in the complaint. Consequently, at the close of the Board's case, PFC moved to dismiss the complaint as to those five individuals about whom no evidence was presented. App. 5a. At that time, the ALJ sua sponte advised the Board and the Union to move to further amend the complaint to add unknown and unnamed persons discharged under PFC's new disciplinary policy, and then granted the motion to add such unknown persons. Id.[1]

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[1] Although petitioner now suggests that a sweeping remedy is entirely consistent with Board law, it is apparent from the hearing transcript that had it not been for the ALJ's prodding, neither the Board nor the Union intended to expand the focus of its case beyond the eleven named individuals. J.A. 307-309, 314-324. The fact that all parties were operating on the notion that the trial was limited in scope solely to the individuals specifically named in the complaint is underscored by the exchange between the ALJ and counsel, after the ALJ suggested the idea of the amendment in response to PFC's motion to dismiss. The Union's attorney stated, "Your Honor, can I ask perhaps a question that shows my ignorance. . . . How, in fact, do we go about -- Do we -- Should we amend the complaint to include 'and all other unknown and unnamed people who may have suffered from this.' Is that the way we accomplish that?" The ALJ responded, "That would certainly be the best way to do it and I would suggest you discuss that with Counsel for General Counsel because they have it within their discretion whether or not to pursue that." J.A. 314-315.

The ALJ's decision to expand the case after the close of the Board's evidence transformed the case from a purposefully limited action to an action seeking sweeping relief for an indefinite and constantly growing class of alleged victims. In keeping with the ALJ's opinion, the Board subsequently ordered PFC not only to reinstate those six named individual as to whom the General Counsel had presented proof of unlawful discrimination, but also to reinstate with back pay all individuals who were discharged under PFC's new disciplinary policy, regardless of their union affiliation. App. 7a.[2] As a result, PFC was faced with presumptive liability for hundreds of thousands of dollars of back pay and reinstatement to hundreds of employees about whom there was not a shred of evidence of any union interest, activity or affiliation. App. 12a.

3. The Fourth Circuit's decision

The Fourth Circuit, in a unanimous opinion authored by Judge Luttig, affirmed the Board's findings of certain violations of the National Labor Relations Act (which are not at issue here), but determined that the Board's remedial order exceeded its authority insofar as it required: (a) that PFC reinstate with back pay all of the employees discharged by PFC regardless of the reasons for their discharge; and (b) that PFC rescind the new disciplinary policy. App. 10a. The appeals court explained that in order to remedy discrimination, the Board's remedial order must be "congruent with the scope of discrimination." App. 11a. The court warned against "the Board's substitution of its own 'business judgment' for the employer's legitimate business judgment." App. 11a. The court emphasized the complete lack of evidence that any individuals other than six known

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[2] As of September 9, 1996, the number of discharged workers was more than 300 employees. The number at present is closer to 400 employees -- a number greater than PFC's regular workforce.

union activists were improperly discharged or affiliated in any way with the Union. App. 12a. It also emphasized the lack of rationality in requiring PFC to rescind a facially neutral discipline policy that the Board itself conceded could be reinstituted the day following its rescission. Id.

Accordingly, the Fourth Circuit required the Board to modify its remedial order: (a) to permit PFC to retain its new disciplinary system unless substantial evidence develops that it was being enforced in a manner discriminatory toward the Union or pro-union employees; and (b) to negate the requirement that PFC reinstate with back pay any employee, (except those six employees about whom evidence was presented and specific findings were made concerning PFC's motivation for their discharges), until such time as it is proven that their discharges were the consequence of their pro-union affiliation or sentiments. App. 15a.

Both the Board and the Union filed petitions for rehearing and suggestions for rehearing en banc, which were denied by the Fourth Circuit. App. 70a-71a.

REASONS FOR DENYING THE WRIT

I. The Fourth Circuit Properly Determined, On The Facts Of This Case, That The Board Exceeded Its Remedial Authority.

In requiring that the Board's remedy be tailored to address the specific violations found, the Fourth Circuit acted consistently with case law, including the decisions of this Court, and with the requirements of the National Labor Relations Act. The Fourth Circuit's decision prevented the Board's back pay remedy from extending beyond the few employees held to have been discharged for their union activities to encompass employees who were discharged for entirely legitimate reasons. The decision also assured that PFC would be permitted to use its own business judgment as to the most effective promotion and discipline policy, in the

absence of any evidence of discriminatory enforcement. App. 15a. Thus, the appeals court assured that Board's remedy would correct actual violations and not improperly interfere with legitimate business decisions.

It is a cardinal principle of labor law that "a proposed remedy be tailored to the unfair labor practice it is intended to redress." Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 900 (1984). In Sure-Tan, the Court noted that the Board's authority was limited under 29 U.S.C. ' 10(c) to orders that "effectuate the policies of the Act." Sure-Tan, 467 U.S. at 900. Thus, this Court explained that "a back pay remedy must be sufficiently tailored to expunge only the actual, and not merely speculative, consequences of the unfair labor practices." Id. at 900 (citation omitted) (emphasis in original). Based on this rule, the Court rejected a back pay award unsupported by "record evidence as to the circumstances of the individual employees." Id. at 901.

This requirement of a tailored remedy is necessary to prevent improper intrusions into business operations. Thus, for example, the D.C. Circuit required modification of an order of the Board as "overbroad, since it catches within its sweep not only prohibited conduct such as that which formed the basis for the finding of unfair labor practices here, but a number of otherwise valid management practices." McGraw-Edison Co. v. NLRB, 533 F.2d 1266, 1268 (D.C. Cir. 1976); see also Gold Coast Restaurant Corp. v. NLRB, 995 F.2d 257 (D.C. Cir. 1993) (requiring modification of Board's overbroad order where such order prevented employer from utilizing its disciplinary system for legitimate business purposes). The Fifth Circuit has likewise determined that a sweeping back pay and reinstatement remedy by the Board for an employer's unlawfully motivated consolidation of its business that resulted in the discharge of numerous employees was not sufficiently tailored to the union animus found. See Electronic Data Systems Corp. v. NLRB, 985 F.2d 801, 807 (5th Cir. 1993).

Similarly, the Sixth Circuit has held that "an order is overly broad" that compelled an employer "to reinstate individuals absent a showing of wrongful discharge." Marlene Indus. Corp. v. NLRB, 712 F.2d 1011, 1020 (6th Cir. 1983). Moreover, as the Marlene court explained, the remedial powers of the Board in making back pay awards are expressly limited by the terms of the National Labor Relations Act. The Act states, "No order of the Board shall require reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause." 29 U.S.C. §160(c); see also Ultrasystems Western Constructors, Inc. v. NLRB, 18 F.3d 251, 259 (4th Cir. 1994) (applying 29 U.S.C. § 160(c) and requiring modification of remedy to assure it is "congruent with the scope of discrimination, so that its enforcement neutralizes the discrimination, and does not go beyond").

The portion of the Fourth Circuit's decision challenged by petitioner does no more than apply the well-settled requirement of a tailored remedy set forth in Sure-Tan, McGraw-Edison, Marlene Industries and elsewhere, and implicit in the Act itself. As the court explained, the Board's broad order "essentially presumes discrimination by the company in its discharges under a facially neutral business plan." App. 11a (emphasis in original). There was "absolutely no evidence" regarding the discharges of the overwhelming number of persons affected by the Board's order. App. 12a.

As to all but the six discharged employees about whom evidence was presented at trial, the Board's decision below was plainly overbroad. The Board's lack of tailoring was similarly clear in the requirement that PFC's new disciplinary policy be rescinded. As the Fourth Circuit recognized, this policy was facially neutral, and no evidence indicated discriminatory application to anyone besides five

union activists[3] during a one-month period. App. 12a. Requiring that this policy be entirely abandoned and replaced with some other policy, perhaps similar, but less satisfactory to PFC, would serve no purpose. Indeed, as Judge Luttig's opinion notes, at oral argument counsel for the Board conceded that PFC "could rescind its 'unlawful' disciplinary policy on one day and lawfully reimplement the exact same plan the next day, provided that the company satisfies the Board that it has been purged of its malevolence toward the union." App. 12a. If something as simple as a rescission of the policy on one day and reimplementation of the exact same policy on the following day can "cure" its illegality, there is no justification whatsoever for a sweeping remedial order that grossly exceeds any legitimate objectives and unfairly impinges upon otherwise valid management practices over a multi-year period that are causally and temporally unrelated to any union activity.

It should be noted that the appeals court did not rule out the possibility of reinstatement and backpay for the numerous discharged employees about whom no evidence was presented, but merely required that such a remedy be justified by proof. App. 15a. Similarly, the court required that there be proof of discriminatory enforcement of the new disciplinary policy as a condition for any requirement that it be rescinded. Id. The court's order merely directed that the remedy in this case be tailored "so as not to prohibit lawful employer activity." App. 13a (emphasis in original). It did nothing more. Thus, no further review by this Court is needed.

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[3] The sixth employee found to have been discriminatorily discharged was not discharged under the new disciplinary system.

II. The Fourth Circuit's Decision Is Not In Conflict With Other Appellate Decisions.

Petitioner's primary ground for seeking certiorari review in this case is its contention that there is a direct conflict between the decision below and other appellate decisions. As explained in Part I, however, the Fourth Circuit in this case quite properly applied to particular facts the well-established requirement that the Board's remedies be tailored to proven violations. Each of the cases on which petitioner relies is readily distinguishable from the decision below.

Petitioner cites four cases for the proposition that where an employer's policy is "adopted illegally . . . [it] must be rescinded, and . . . each employee injured by the use of the illegal policy, must be made whole." Pet. 15. None of these four cases stand for this proposition. First, NLRB v. Frigid Storage, Inc., 934 F.2d 506, 510 (4th Cir. 1991), does not even mention the Board's remedy or its appropriateness. Rather, the only relevant issue before the court was whether the employer's written warning system for work infractions was implemented in retaliation for union activity. Petitioner's representation to this Court, (Pet. 16), that the case involved a challenge to the Board's remedy is without foundation. There is no conflict between Frigid Storage and the case at bar. Frigid Storage did not even discuss the Board's remedial authority.

The Seventh Circuit's decision in Electri-Flex Co. v. NLRB, 570 F.2d 1327 (7th Cir.), cert. denied, 439 U.S. 911 (1978), is distinguishable from the instant case for the same reason as the Frigid Storage decision -- the court was not asked to address nor did it address the scope of remedy ordered. Rather, the court in Electri-Flex merely concluded that the employer's implementation of a written warning system to retaliate against union supporters violated Section 8(a)(3) of the Act. Electri-Flex, 570 F.2d at 1334-35.

Petitioner further points to the Fourth Circuit's decision in Fieldcrest Cannon, Inc. v. NLRB, 97 F.3d 65 (4th Cir. 1996), as a case requiring an employer to "rescind unlawful company rules." Pet. 15. Unlike the employers in Frigid Storage and Electri-Flex, the employer in Fieldcrest Cannon did challenge to the scope of the Board's remedy. In upholding the Board's remedial measures, however, the Fourth Circuit expressly limited its holding to the "extraordinary circumstances" of the case, which the Board had characterized as "pervasive" and "outrageous." 97 F.3d at 72. Because of these unusual circumstances, the court found the remedy "did not amount to an abuse of the Board's remedial power." Id. at 74. The Fieldcrest Cannon court carefully noted, "We do not suggest that these steps would be appropriate in every case." Id.

In short, only the unique facts of Fieldcrest Cannon justified the broad remedy there, and the very different facts of this case are sufficient to distinguish it.[4] The same is true of Hyatt Corp. v. NLRB, 939 F.2d 361, 375 (6th Cir. 1991), where the court found "direct evidence, in addition to statistical evidence, that the termination of all twelve employees was substantially motivated by anti-union animus." Here, in contrast, there was no evidence of improper motive for the discharge of any but six of the hundreds of employees covered by the Board's order.

In addition to alleging nonexistent conflicts with the circuit court authority just discussed, petitioner contends that the Fourth Circuit's decision conflicts with this Court's decision in Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964), and the D.C. Circuit's decision in Power, Inc. v. NLRB, 40 F.3d 409 (D.C. Cir. 1994). Pet. 17. Fibreboard and Power, Inc. are readily distinguishable. Both of those cases addressed the Board's remedial authority in the

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[4] Interestingly, the Fieldcrest Cannon opinion was authored by Chief Judge Wilkinson, a member of the unanimous panel in this case.

special context of an employer who unlawfully refused to bargain with the union over the mandatory subject of subcontracting in violation of Section 8(a)(5) of the Act. The employers in both cases had discontinued a segment of their operations after subcontracting the work to a third party. The appropriateness of a widespread back pay and reinstatement order in those cases was expressly predicated on the need "to insure meaningful bargaining." See Power, Inc., 40 F.3d at 425 (quoting Fibreboard, 379 U.S. at 216). Because PFC was never under any bargaining obligation with the Union, the rationale asserted for the sweeping remedy in Fibreboard and Power, Inc. is wholly inapplicable.

In short, none of the numerous authorities cited by petitioner conflicts with the Fourth Circuit's decision on the facts of this case. Petitioner has taken extreme liberties in interpreting case law from various circuits in an attempt to create the appearance of a conflict and attract this Court's attention. There is, in the end, no conflict that requires resolution by this Court, and this basis for review does not apply here.

III. The Issues Presented In This Case Are Highly Fact-Specific and Are Not Sufficiently Important To Warrant This Court's Review.

Even a cursory reading of the decision below shows that it is addressed to unusual and complicated facts. The Fourth Circuit does not purport to be establishing a new principle of law, but rather merely applies settled law to specific facts. There is no foundation for an argument that this case is a matter of significant public interest and should for that reason be reviewed by this Court.

Nevertheless, petitioner attempts to argue that this case is important because it is serving as precedent for further error. Pet. 28-29. Citing the Fourth Circuit's recent decision in Eldeco, Inc. v. NLRB, 132 F.3d 1007 (4th Cir. 1997), petitioner states that as in this case, the Fourth Circuit

in Eldeco declined to punish a company and allow remedial relief for its illegally implemented but facially neutral drug testing program, where there was no evidence that it was disparately enforced against union sympathizers. Pet. 28. Although the holding and rationale in Eldeco are consistent with the holding and rationale in Performance Friction, Eldeco is also consistent with many other prior decisions. Moreover, Eldeco, which was decided by an entirely different panel of the Fourth Circuit, does not even mention Performance Friction in reaching its conclusion. In fact, contrary to petitioner's purely speculative suggestion that the instant case has already served as a dangerous precedent, PFC's research did not uncover a single case in any federal court since the June 30, 1997 decision in this matter that makes any mention of Performance Friction.

Petitioner also attempts to argue that this case is of importance based on petitioner's speculation as to the employees' feelings about the new disciplinary system. Pet. 18-19. According to petitioner, the system is "a daily reminder to all PFC employees of the consequences of attempting to exercise their rights under the NLRA" that results in "terrified" employees. Pet. 9, 18. This is, of course, pure conjecture; it has no basis in the record. Moreover, it is completely unreasonable conjecture. Most of the approximately 400 employees terminated by PFC since 1994 who were covered by the Board's sweeping remedial order were hired after the new disciplinary system was put into effect, were not even aware of the prior system or any union activity, were discharged for reasons clearly permissible under both the new and the old systems (e.g., substance abuse, sexual harassment, insubordination), or simply quit by choosing not to return to work. Moreover, because they were hired under the new disciplinary system, those employees knew from the date they accepted employment the legitimate, nondiscriminatory rules by which their performance and conduct would be evaluated.

Similarly, petitioner's additional suggestion that the 400 or so employees terminated by PFC since 1994 under its new disciplinary policy were discharged "in order to cover [PFC's] tracks", (Pet. 18-19, n.3), is both completely speculative and implausible. It simply defies logic that PFC would "get rid of" 400 employees over a period of several years solely to "cover its tracks" as to five or six union activists discharged in a one-month period during the Spring of 1994. Such a strategy makes no business sense and would be inconsistent with PFC's need, as demonstrated in the record, to have a well-trained workforce committed to quality. The sheer number of terminations at PFC and the comparatively nominal number of union adherents (six) highlights the lack of any credible foundation for petitioner's speculation.

In sum, there is no basis for concluding that this case involves issues of sufficient public importance to merit the attention of this Court. For this reason, the petition should be denied.

IV. The Fourth Circuit Had Jurisdiction To Modify The Board's Overbroad Remedial Order.

Petitioner claims that the Fourth Circuit improperly engaged in its own "fact-finding" to justify its decision to limit the Board's overbroad remedy and thereby exceeded its appellate jurisdiction. Pet. 22-23. Even if the decision below involved such error, it would not be a sufficient justification for review by this Court. In fact, however, there was no such error. The Fourth Circuit's decision was an entirely customary and proper exercise of appellate jurisdiction.

Petitioner's "jurisdiction" argument is nothing more than a restatement, under a new label, of its earlier argument that the Fourth Circuit inappropriately infringed upon the Board's remedial authority. In its attempt to recharacterize this earlier argument as a jurisdictional issue, Petitioner apparently objects to two statements in the opinion below -- neither of which had any impact on the decision of the court. First, petitioner refers to a statement in the court's judgment (not its opinion) that eligible employees should receive back pay with interest "up until they declined to accept Performance Friction Corporation's offer of reinstatement." App. 74a. Petitioner argues that the Fourth Circuit lacked jurisdiction to address this point because PFC first raised the question of its reinstatement offers to those six individuals (none of whom accepted the offers) in its Objections to Proposed Judgment dated July 18, 1997, and there was no opportunity for the Board or the Union to respond on that issue. Pet. 24-25. Petitioner contends that this matter must be left to the Board's compliance proceedings.

It is, however, black letter law that an employer's back pay obligation terminates upon an unconditional offer of reinstatement. See, e.g., Canova v. NLRB, 708 F.2d 1498, 1505 (9th Cir. 1983); Oil, Chem. & Atomic Workers Int=l Union v. NLRB, 547 F.2d 598, 601 n.3 (D.C. Cir. 1976); cf. Ford Motor Co. v. EEOC, 458 U.S. 219 (1982) (reaching same conclusion under Title VII of the Civil Rights Act of 1964 in reliance on analogous remedial provisions and case law under NLRA). In late September and early October of 1996, with the knowledge of counsel for both the Board and the Union, PFC made unconditional reinstatement offers. At the request of the Union's counsel's and the suggestion of the Board Compliance Supervisor, PFC provided copies of those offers to counsel for the Board and the Union. Because the reinstatement offers were made in October of 1996, after PFC had already filed its Brief with this Court, there was no forum within which PFC could have raised the issue until the judgment phase.

In any event, contrary to petitioner's assertion, the Fourth Circuit did not "engage in fact-finding" or "foreclose full make-whole remedies to [the] illegally fired discriminatees" when it ordered that back pay be cut off as of the date that the discriminatees refused PFC's reinstatement offers. Pet. 8. The Fourth Circuit merely acknowledged, consistent with long-standing precedent, the well-settled principle that any back pay remedy must cease after a reinstatement offer is declined. Even if the Fourth Circuit's judgment could fairly be characterized as "fact-finding" on the issue of whether reinstatement offers were made, the judgment does not foreclose the Board's ability to present evidence during compliance proceedings challenging the legitimacy of those reinstatement offers.

Petitioner makes reference to one other supposedly improper statement of the Fourth Circuit -- the total number of persons who have been subject to the new disciplinary system. Pet. 27. The Fourth Circuit, citing the joint appendix and briefing, said, "[A]ccording to its counsel, the company has now terminated over 300 employees total." App. 4a. It is difficult to see anything improper in this observation.[5] It is even more difficult to imagine how, even if there was impropriety in this statement, it could possibly justify review by this Court.

In the end, there is no basis at all for petitioner's allegations that the Fourth Circuit exceeded its jurisdiction and engaged in improper fact finding. Just as with its arguments on nonexistent conflicts and issues involving unique facts, this supposed basis for review should be rejected.

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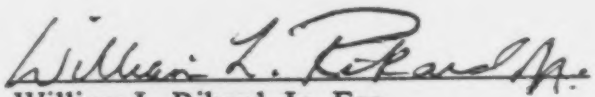
[5] The Fourth Circuit's underlying point -- that numerous employees were discharged pursuant to the new disciplinary policy -- is well-supported by the record. App. 4a.

CONCLUSION

For the reasons stated above, PFC respectfully asks this Court to deny the petition for writ of certiorari.

Respectfully submitted,



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Dated April 20, 1998.